civilized nations, and should not permit untrained or incapable persons to participate in their political life as voters or governors.

The question of the participation of resident aliens in the political life of the community is thus seen to involve the most fundamental principles in international life. To deny them all such participation is to destroy the society of nations by fostering national and racial unsociability; to allow unlimited participation is also to destroy the society of nations by allowing lower standards of civilization to pull down higher standards and thus to produce social chaos. Those capable of exercising the franchise and the governmental power should, in the interests of the society of nations, have participation in the governments of their choice; those incapable should be gradually rendered more capable until their limit of capacity is reached, and participation in political life should follow promptly upon attainment of the capacity for such participation. On the other hand, racial and national ideas are to be respected and even fostered, so far as they are not inconsistent with the preservation of the society of nations. No more delicate or important task rests upon a government than that of deciding upon the nature and degree of the protection which it shall give to its citizens resident in other nations who participate in the normal or abnormal political life of the community, or who are compelled against their will to so participate, or who, being qualified by capacity and training to vote and govern, desire to become citizens of the nation of their residence and are denied this privilege.

The CHAIRMAN. The next heading is the "Rights and Remedies of Aliens in National Courts," and we will be addressed by Mr. Frederic R. Coudert of New York.

ADDRESS OF MR. FREDERIC R. COUDERT, OF NEW YORK CITY.

ON

The Rights and Remedies of Aliens in National Courts.

The subject is naturally one of rather narrow limitations. The general position of the alien, as the previous speakers have shown, is that of gradual emancipation from the disabilities imposed upon him

as the result of prejudice, of ignorance or of that primitive psychology expressed by the English costermonger in the saying: "He's a stranger; 'eave 'alf a brick at him."

The substantive rights of the alien must be determined by the general law of the land, and yet these substantive rights can have no value unless there be correlative procedural rights, and would be a mere rhetorical flourish were aliens practically excluded from the legal tribunals.

There are few more interesting episodes in history than that of the creation about the year 300 B. C. in Rome of a special Pretor (Peregrinus) to hear the causes of foreigners. Aliens in primitive communities, as so delightfully and cogently explained by Mr. Fustel de Coulanges, could have no rights in the community, for all rights were predicated upon a common religion, based upon the worship of common ancestors and of the local divinity. But, yet, even in the time of Pericles and of Aristotle these ancient views as to aliens had well-nigh disappeared and the liberal Athenian democracy had placed them in almost the same position that they now occupy in modern civilized states, for we find Aristotle saying:

> Leave out of consideration those who have been made citizens or who have obtained the name of citizen in any other accidental manner. We may say, first, that a citizen is not a citizen because he lives in a certain place, for resident aliens and slaves share in the place; nor is he a citizen who has no legal right except that of suing and being sued; for this right may be enjoyed under the provision of a Treaty. *Even resident aliens in many places possess such rights,* although in an imperfect form; for they are obliged to have a patron.[1]

Considering the position of the alien in modern law courts, we naturally begin with England. The disabilities of aliens in England have been practically removed and they have complete and free access to the law courts, but it was probably not without a long struggle that the alien in England was finally admitted into the courts upon an equality with subjects. Their rights in the Middle Ages were very uncertain and seem to have been gradually acquired by the foreign merchants as merchants, rather than as aliens. The merchants were

[1] Politics of Aristotle, Jowett's Translation, Vol. 1, p. 67; Bk. III, I, 4.

evidently useful to the kings and the kings protected them to some extent, for Littleton says of aliens who have come into England under the safe conduct of the king:

They are not bound to sue according to the law of the land, nor to abide the trial by twelve men and other solemnities of the law of the land, but shall sue in the Chancery and the matter shall be determined by the law of nature.[2]

This statement that their rights shall be those accorded by the law of nature has a peculiar resemblance to the French doctrine that the alien possesses those rights only which belong to the *jus gentium* but not those which belong to the *jus civile*. Their rights, however, were more in the nature of peculiar and occasional privileges granted by the king's courts and they do not seem to be recognized by the law of the land. Pollock & Maitland say that the common belief as to them was that they were all usurers and therefore living in mortal sin. Henry III banished the so-called Caursini (an Italian guild) but they only lay hid for a time, the king conniving at their presence and a little afterwards they are found acquiring splendid palaces in London and no one dared attack them for they called themselves the Pope's merchants.

With the growth, however, of the so-called commercial law, the distinction between aliens and subjects gradually breaks down. This law is not looked upon as part of the common law but as a certain general international law common to all mercantile transactions.

The probable origin of the right of the state to take the property of aliens is admirably described by Pollock & Maitland, as follows:

The truth seems to be that in the course of the thirteenth century our Kings acquired a habit of seizing the lands of Normans and other Frenchmen. The Normans are traitors, the Frenchmen are enemies. All this will be otherwise if a permanent peace is ever established. But that permanent peace never comes, and it is always difficult to obtain a restoration of lands which the King has seized. France is the one foreign country that has to be considered in this context; Germans and Italians come here as merchants, but they have no ancestral claims to urge and do not want English lands, while as to

[2] Pollock & Maitland's History of the English Law, 1st ed., p. 449.

Scotland, owing to the English King's claim to an overlordship, or to some other reason, Balliols and Bruces hold land on both sides of the border until a long war breaks out between the two countries. To us it seems that the King's claim to seize the lands of aliens is an exaggerated generalization of his claim to seize the lands of his French enemies. Such an exaggerated generalization of a royal right will not seem strange to those who have studied the growth of the King's prerogatives.[3]

This is an amusing illustration of the absurdity of trying to find philosophic justification for legal anomalies whose only explanation is historic; they are merely rudimentary survivals like the vermiform appendix in man and the clavicle in the cat.

The English law makes no distinction of alienage in the courts, but, like the American States, has long required security for costs from non-residents, this distinction applying alike to aliens and subjects.

(a) In the United States the rights of aliens to sue in the Federal courts is guaranteed by the Constitution, the third article of which extends the judicial power to

all cases, in law and equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority; * * * to controversies between two or more States, between a State and citizens of another State, between citizens of different States * * * and between a State, or the citizens thereof and *foreign* states, citizens, or subjects.

The alien is thus in a peculiarly favored position, and, indeed, the result of this constitutional provision is to frequently place him in a more advantageous position than the citizen; for the citizen, indeed, cannot sue in the Federal court unless the defendant is a non-resident of the State, while the alien may sue the citizen of any State in the proper Federal court, although they both reside in the same jurisdiction.

Questions, of course, arise as to what constitutes alienage and the proper district in which actions should arise. These questions, how-

[3] Pages 445–46.

ever, are not incident to the rights of aliens *qua* aliens and their discussion here would be out of place.

There is, besides this constitutional right and the general statutory provisions carrying it out, a very peculiar provision of our Federal Judiciary Law which has been in our statutes since the enactment of the original Judiciary Act and which has been invoked, as far as I am able to discover, upon one occasion only. This provision is now found in the new Federal Judicial Code (Chapter Two, Par. Seventeenth) conferring jurisdiction upon the district courts:

Seventeenth. Of all suits brought by any alien for a tort only, in violation of the laws of nations or of a treaty of the United States.

I have searched in vain for the origin of this peculiar enactment, but Congress seems to have been guided by great solicitude for aliens and a desire to give them the fullest and freest access to the courts of the nation. This paragraph was recently brought in question in the case of *O'Reilly* v. *Brooke,* which was twice before the District Court and was finally decided by the Supreme Court of the United States.[4]

In this suit the plaintiff sued General Brooke, who had been Governor General of Cuba during the American intervention, on the ground that he had, contrary to the law of nations and to the eighth article of the Treaty of Paris, dispossessed her of property of which she had been lawfully possessed and which had been a hereditament in her family since the early part of the eighteenth century. This property consisted in the right to conduct an exclusive slaughter house in the city of Havana.

In the District Court, when the case came up upon a demurrer, no serious objection was made by counsel for General Brooke, the Attorney-General of the United States, to the jurisdiction of the District Court, and the matter was, therefore, scarcely discussed. It was assumed that as the plaintiff was an alien and as the alleged wrongs were predicated upon a violation of international law and treaty there could be no question of the jurisdiction of that court.

[4] 135 Fed. Rep. 384; 142 Fed. Rep. 855; 209 U. S. 45.

The court held on the trial that the plaintiff had a cause of action against General Brooke but that by reason of the ratification of Brooke's act by the executive and by Act of Congress (the Platt Amendment so-called) the plaintiff's remedy was against the United States.

The Supreme Court of the United States terminated the controversy by deciding that "the plaintiff had not possessed property within the meaning of the treaty but that it was an office which terminated with the Spanish sovereignty." The only reference made, however, to the section of the Judiciary Act in question is the following:

If the plaintiff lost her rights once for all by General Brooke's order, and so was disseised, it would be a question to be considered whether a disseisin was a tort within the meaning of Rev. Stat., § 563 (16). In any event the question hardly can be avoided whether the supposed tort is "a tort only in violation of the law of nations" or of the Treaty with Spain. In this court the plaintiff seems to place more reliance upon the suggestion that her rights were of so fundamental a nature that they could not be displaced, even if Congress and the executive should unite in the effort. It is not necessary to say more about the contention than that it is not the ground on which the jurisdiction of the District Court was invoked.[5]

We have thus no further light upon this very peculiar statute. It is to be hoped that the courts will have further opportunity to construe it, as it seems to have been sadly overlooked by members of the bar and might be made use of to maintain and develop the rights of aliens under international law. The statute is in any event fraught with potentiality and its development will be watched with interest.

There is another peculiar situation arising with regard to the Federal courts. We have seen that they might be resorted to by American citizens and by aliens. There exists, however, a very large class of persons under our flag who, not fitting into either of these categories, may not have their day in the Federal courts.

The inhabitants of our recently acquired Spanish possessions have

[5] 209 U. S. 45, at p. 51.

been expressly refused citizenship by Congress. The treaty of Paris relegates their political status to that body, which has persistently refused to recognize them as American citizens. To contend that they are aliens is absurd, for alienage is predicated upon allegiance to a Power other than the United States, and this anomalous people have certainly been deprived of allegiance to Spain and can not and do not profess any other allegiance than that to the United States. If they are not citizens, what are they?

We have a partial answer from the Supreme Court of the United States in the case of *Gonzales* v. *Williams* (192 U. S. p. 1), in which a Porto Rican immigrant who was detained by Commissioner Williams, sued out a writ of *habeas corpus* in the United States Circuit Court on the ground that she was not an alien immigrant and therefore not within the jurisdiction of the commissioner. The Circuit Court held that as she was not a citizen and as the category of citizen and alien were necessarily mutually exclusive, she must still be considered an alien and subject to deportation. The matter was taken to the Supreme Court of the United States and there fully argued.

Counsel for Gonzales claimed that whether or not she was a citizen might be open to question, but she was certainly not an alien and was at least an American national. Her status was claimed to be analogous to the Arab inhabitants of Algeria, who, while not French citizens, were yet French subjects. In the Insular Cases the Attorney-General of the United States had been frank enough to treat Porto Ricans as American subjects. The court, however, did not go fully into this question, and evidently shrank from categorically adopting a classification which would treat millions of persons owing allegiance to the American flag as "subjects." Wisely, perhaps, the court contented itself with holding that the petitioner was not an alien within the meaning of the immigration laws. Chief Juctice Fuller, in speaking for the court, stated the question and the substance of the decision in the following paragraph:

We think it clear that the act relates to foreigners as respects this country, to persons owing allegiance to a foreign government, and citizens or subjects thereof; and that citizens of Porto Rico, whose

permanent allegiance is due to the United States; who live in the peace of the dominion of the United States; the organic law of whose domicil was enacted by the United States, and is enforced through officials sworn to support the Constitution of the United States, are not "aliens," and upon their arrival by water at the ports of our mainland are not "alien immigrants," within the intent and meaning of the act of 1891.[6]

It would appear reasonably evident, however, that these undefined but not alien persons could not sue in the Federal courts of the United States. Admittedly they are not citizens, and it would be difficult to hold that they are aliens within the meaning of the Judiciary Act but not aliens within the meaning of the Immigration Act.

It is doubtful whether we have ever had an analogous class in this country. Perhaps the free Negro prior to the Fifteenth Amendment may furnish a precedent. Under the doctrine of the Dred Scot decision he was not and could not be a citizen, but he certainly was not an alien. He could not under the Constitution sue in the Federal court, as the court in that famous case distinctly held.

Again, the Indian who had separated himself from his tribe before the recent Acts conferring citizenship upon such persons may have also been in the same category. (See *Elk* v. *Wilkins.*)

It is, in any event, apparent that the peoples of these unincorporated territories are in a very anomalous position, and that as far as their right of access to our courts is concerned, they have not the rights and privileges of aliens. As long as very few of them come into the States of the United States the question may be largely academic, but if they should begin at any time to migrate on a large scale from their own homes to other portions of our dominion, the question must necessarily become acute and call for definite settlement of their status by Congress.

(b) The position of aliens in the State courts is, of course, determined by the procedural law in each jurisdiction. Generally speaking, we may say that there is no discrimination against aliens as aliens. The State laws generally provide that in suits brought by

[6] Page 13.

non-residents against a resident there shall be security for costs. The New York form may be taken as a normal one and the Code of Civil Procedure prescribes the formalities for the giving of such security. These provisions apply not only to non-residents of the State, but in certain cases to non-residents of the county. The security is given to cover the costs solely and not the amount of money judgment which may be recovered. The usual bond required does not exceed $250.

It will be noted here, however, that the requirement is based not upon allegiance but upon mere non-residence, and that a Frenchman, an Englishman or a resident of Massachusetts are placed upon the same footing.

These statutes, therefore, do not enter into the category of legislation dealing with or affecting the status of aliens as such. Disabilities of aliens in this respect are due not to their allegiance but to the accident, where it exists, of their non-residence. Resident aliens have practically the same right to sue as State citizens. They are under some disabilities as regards acting as executors or administrators.[7]

III.

THE POSITION OF ALIENS IN THE COURTS OF CONTINENTAL EUROPE.

The question of alienage in Europe is of considerable more complexity than in England or America. We will take the French system as fairly typical. Variations from that system will be mentioned more or less incidentally. The situation of aliens in France as regards their private rights is regulated by the eleventh article of the Civil Code, which prescribes:

Art. II. An alien shall enjoy in France the same civil rights as those granted to French people by the treaties of the nation to which such alien belongs.

Few articles of any code have given rise to more discussion both among writers and among courts. It would appear certain, however, that this article establishes not legislative reciprocity but diplo-

[7] New York Code Civil Procedure, Secs. 2612 and 2661.

matic reciprocity. Thus strictly speaking, the alien in France enjoys only those civil rights accorded to him by treaty and not those which his national law might accord to Frenchmen in his country. It has been held that the alien would enjoy these rights even when the treaty which accorded them to Frenchmen contains no reciprocal stipulation that they should be accorded to such aliens in France.[8]

This reciprocity is one that belongs to the nation as a nation, not to the individual as such. The individual can only ask for the same rights as would be accorded to a Frenchman in similar condition, and he could in no event require a wider range of rights than those accorded to Frenchmen themselves.[9]

Most of the treaties deal with particular subjects, commercial relations, copyright, trade-mark, patents, etc. There are few conventions which bestow enjoyment of all private rights upon foreigners.[10]

The question of deciding what rights a foreigner has in the absence of treaty has given rise to much difficulty and a great amount of litigation. The general principle seems to be that we must eliminate from the category of rights those peculiar and positive dispositions of the civil law, such as the capacity to transmit and to inherit *ab intestat* (Arts. 726 and 912 of the Civil Code, Law of July 14, (1819), the right to acquire mining concessions, to become stockholders of the bank of France, protection of literary rights, patents, copyrights, etc., but there are still heated controversies regarding other private rights which do not belong peculiarly to the civil law.

There are four systems advocated by well-known writers and jurists. However, the system which seems to have the most numerous and notable adherents is that which is found set forth in the authoritative work on the Civil Law of Aubry & Rau (Merlin, Duranton, Proudhon, Richelot, Toullier). In this system the expres-

[8] Court of Cassation, Feb. 9, 1831; Sirey 1831, 1, 415. Authors: Aubrey & Rau, Tome 1, Par. 79, p. 310; Demolombe, Tome 1, No. 241, and Toullier, 4, No. 102; Baudry-Lacantinerie Houques Fourcade, Tome 1, 632.

[9] Court of Cassation, Aug. 10, 1813. Sirey, Chronologique, 1813; Aubry & Rau, Tome 1, p. 79; Weiss, Treatise, p. 124.

[10] Franco-Servian Treaty, Jan. 18, 1883. Convention Consulaire Franco-Espagnole, Jan. 7, 1862; Franco-Brésilian Treaty, clause of the most favored nation in civil law.

sion "Droit Civil" includes not all private rights but only those which are derived from the positive law or *jus civile*. These rights the stranger cannot enjoy in the absence of a treaty unless he has been authorized to fix his domicile in France. In regard, however, to the rights which are derived from the *jus gentium*, Article 11 of the code does not apply and the alien may always exercise them.[11]

While this distinction may be theoretically possible, it is in practice very difficult of application.

What are the rights which fall within the domain of *jus civile* and what those which belong to the *jus gentium?*

Some writers propose as the test whether the right is generally admitted under all legal systems (Aubry & Rau); other writers find this criterion insufficient and think it necessary to analyze each case on its own merits. As a matter of fact, there is no absolute criterion: each question must be examined as it comes up. Some have been pretty well settled by current of decisions; others are still open. The tendency of the courts, however, is to diminish the number of civil rights, pure and simple, which belong exclusively to Frenchmen and from whose enjoyment foreigners are excluded. The following rights are, however, generally considered to be civil rights:

1. The right of adoption or of being adopted;
   The right of prescription;
   The right to invoke jurisdiction of a French court in a case to which no Frenchman is a party;
   The right of *jouissance legale* of father and mother.
2. The right of *hypotheque legale.*

The question of the right to guardianship has been in some doubt but has finally been held to belong generally to the natural law (Tribunal of the Seine, 2 May, 1900). There are, however, decisions the other way.

Early decisions refuse to an alien the right of domicile in France unless he had complied with Articles 13 and 102 of the Code Civil, which prescribe as follows:

11 Court of Cassation, June 7, 1826. "Recueil" of Sirey, Chronologique, 1826. July 11, 1848; "Recueil" of Dalloz, 1848, 1, 140, May, 20, 1862; Sirey, 1862, 1, 673, Feb. 16, 1875; Sirey, 1875, 1, 193.

13. (Amended by Law of 26th June, 1889.) An alien who has been authorized by decree to establish his domicile in France shall have the enjoyment of all civil rights.

The effect of the authorization shall cease at the expiration of five years if the alien does not ask to be naturalized or if his application is rejected. In case of decease before naturalization the authorization and the time of residence which has followed shall count for the wife and children who were minors at the time of the decree granting such authorization.

102. The domicile of every Frenchman as to the enjoyment of his civil rights is at the place of his principal establishment.

This doctrine has been greatly tempered by the judicial recognition of a domicile in fact, not in law, to which are attached certain legal incidents. It seems reasonably accurate to say that the *permis de sejour* under Article 13 has now become a preliminary to naturalization and that a domicile *de facto* in France will give to the foreigner the rights usually springing from domicile among civilized nations with the exception above referred to regarding the possession of certain rights peculiar to the civil law.

With these preliminary observations as to the substantive rights of aliens in France, I will take up the question of their standing before the courts. This question may be conveniently grouped under three heads:

(1) The provisions for security for legal expenses required of aliens as such (*judicatum solvi*);

(2) What particular local court has jurisdiction over suits between aliens or between aliens and Frenchmen, and

(3) The rights of aliens as against other aliens.

As a general principle, all aliens are required to furnish an indemnity before they can come into a French court to sue a Frenchman. Article 16 of the Code Civil provides as follows:

16. (Amended by Law of 5th of March, 1895.) In all cases an alien who is the original plaintiff or interpleads shall be obliged to give security for the expenses and damages resulting from the suit, unless he owns real estate in France of sufficient value to secure the payment thereof,

and this article itself has been modified by the Law of the 5th of March, 1895, which strikes from the code the exception relating to commercial cases, thus making the security applicable to cases in commercial courts as well as elsewhere. This security is termed in the French Law "*caution judicatum solvi.*" The Latin expression is somewhat misleading, since the origin of this provision for security seems to go back to the later Roman law which exacted of every plaintiff, whether Roman citizen or foreigner, the *cautio pro expensis,* which related only to the expenses of the trial and did not guarantee the defendant for any judgment which he might obtain against the plaintiff. In France the *judicatum solvi* consists in a guaranty given by the plaintiff, the object of which is to furnish security, not for the execution of the judgment, as the Latin phrase would seem to indicate, but for the payment of the costs or expenses of litigation by the alien as well as any damages which may have been recovered by the defendant in the suit. Under the terms of Article 166 of the Code of Civil Procedure this indemnity is requisite, without exception, and must be provided for *in limine;* this security, however, not being considered matter of public policy (*disposition d'ordre publique*), the party to the litigation may consent to forego it and the French defendant who did not ask for it at the proper time would be considered as having renounced his right to it. On the other hand, it is considered as a matter purely of the civil law and is consequently not accorded to an alien suing another alien in France, unless, of course, the alien plaintiff should possess an authorized domicile in France, under Article 13, in which case he necessarily enjoys all the civil rights of Frenchmen.

The only exceptions, in the absence of treaty rights, to the furnishing of this guaranty are:

(1) If the alien possesses in France real estate of a value equal at least to the amount of any indemnity that might be fixed by the court;

(2) Persons authorized to fix their domicile in France (Article 13);

(3) Where there exists legislative reciprocity;

(4) Where there are treaties between France and other nations by which the nationals of the contracting parties are freed from this obligation. (Code Civil, Article 11.)

The giving of the security is carefully regulated by rules of procedure which it is not necessary to fully detail here. The question of amount is submitted by the defendant to the court, and after an opportunity for discussion by the parties to the litigation, the sum is fixed by judicial order.

In practice, indemnity is usually made by a deposit of money or of securities in one of the public depositories, usually *La Caisse Generale des Depôts et Consignations.* The order fixes the terms under which this deposit is to remain in the depository. In case of an appeal by the foreign plaintiff, another provision for indemnity is necessary.

The two important exceptions to the rule, however, are the one relating to legislative reciprocity and that relating to diplomatic reciprocity. Jurists speak of legislative reciprocity as belonging to the domain of internal (or municipal) law, and diplomatic or treaty reciprocity as belonging to that of the external (or international) law.

For many years subsequent to the enactment of the code, the general opinion among jurists was unfavorable to the rule of exacting this security from aliens. The matter was, however, submitted to a committee (commission) of the Chamber of Deputies for a report as to the expediency of reforming the law in 1892, and the result was a report to the Chamber in which the committee cited the case of a naval constructor of Treport who, having brought suit in England, was forced to furnish an indemnity of 2,500 francs. It was argued that such treatment on the part of the English deserved reciprocity and the consequence was the law of the 5th of March, 1895, above referred to, which abolished the immunity from the *judicatum solvi* accorded by the code in cases in the tribunals of commerce.

This doctrine of legislative reciprocity which the courts apply to the question of *judicatum solvi* is really nothing more than a revival of the old right of retorsion. While apparently fair at

first view, it has the grave defect of naturally leaving the initiative to the other party and creating unfriendly feelings, at least as to the particular question, thus interfering with that amiable and equable frame of mind which conduces to the adoption of treaties.

It is, in my opinion, an unfortunate, not to say a retrograde and vicious doctrine.

Many nations have availed themselves of the diplomatic method to avoid the necessity of furnishing this indemnity. Some treaties expressly exempt nationals of the contracting parties from the giving of security as a condition precedent to bringing suit, while others content themselves with merely stating that the nationals of each party shall have free access to the tribunals, and again some countries have adopted in this respect the most-favored-nation clause.

We find in continental Europe a good deal of diversity in regard to the furnishing of indemnity *judicatum solvi*. Some nations, among which we find Italy, Portugal, Denmark and a few smaller ones, have abolished it entirely. The Italian Civil Code of 1865, Article 8, provides that: "the alien is admitted to the enjoyment of the civil rights accorded to citizens." Italy in this respect, as in many other matters relating to private law, is in the forefront of civilization.

Countries like Belgium and Luxemburg follow the French rule, as does Holland. Russia exacts indemnity *judicatum solvi* except in the case where the plaintiff is solvent. Switzerland, like England and the United States, does not discriminate between its citizens and aliens, but requires all non-residents to furnish security.

Germany bases its law entirely upon the system of legislative reciprocity. The German judge must ascertain the law regarding security prevailing in the country to which the plaintiff belongs. Austria, since 1898, has adopted the same system, as has been done by Spain and Hungary. All these countries, however, have also numerous treaties of exemption, and it is necessary in each case to ascertain whether the country of the forum does not have a treaty with the nation to which the plaintiff in the particular case belongs.

It is apparent that this question is, in continental Europe at least, in a most complicated, unsatisfactory and unsystematic condition,

since intelligent and enlightened public opinion surely requires that an alien, merely because of his alienage, should not be subjected to the necessity for furnishing any guarantees not required of a national. The number of treaties to this effect indicates the feeling of the nations. Two solutions of the difficulty are possible: (1) a general legislative abolition of this limitation on the right of foreigners to sue, or (2) if this be impracticable, a series of general treaties or a general Hague convention bringing about this result. Probably the latter is the more practical course and the one which will be eventually followed.

When a foreigner sues or is sued in France, the question at once arises as to where the venue of the suit should be laid. In case the foreigner has a domicile, even *de facto,* in France, the tribunal of his domicile will have jurisdiction. If the defendant is a corporation and possesses a branch office in France, the tribunal of the district in which this branch office is situated has jurisdiction. In the case of commercial tribunals, the question is regulated just as it would be between Frenchmen, the jurisdiction of the tribunal being based upon certain incidents relating to the origin or place of fulfillment of the obligation. (Article 420 of the Code of Civil Procedure.)

Article 14 of the French Code Civil provides that a foreigner

even not residing in France, may be summoned before the French courts for the fulfillment of obligations contracted by him in France towards a French person. He may be called before the French courts for obligations contracted by him in a foreign country towards French people,

and Article 15 of the code declares on the other hand that:

a Frenchman may be called before the French courts for obligations contracted by him in a foreign country, even towards an alien.

These provisions seem reciprocally fair, and the questions that arise as to the local tribunal having jurisdiction of the particular affair are matters of technical procedure, having little or no relation to the alienage of the parties, but ultimately governed either by domicile, place of business or some incident connected with the origin or fulfillment of the obligation in question.

A more difficult question arises as to suits between foreigners. The Civil Code contains no provision regulating the rights of foreigners to sue each other before the French tribunals. The original draft of the code (1801) conferred upon aliens all civil rights. This was modified, and under the dominant influence of the First Consul Article 11, above referred to, was enacted. There has thus been a good deal of discussion among the jurists and in the schools as to the rights of foreigners to sue each other, it being maintained on the one hand that the French tribunals were for Frenchmen only and that foreigners had no standing. On the other hand, the more liberal minded and modern school of jurisconsults has always maintained that the French tribunals were under a social duty to render justice, not only to their nationals, but to every man on their territory who demanded it.

The tribunals have in fact followed a middle course, the general principle being that they are not compelled by positive law to take jurisdiction in litigations between foreigners, as appears from a judgment of the Court of Cassation of the 2nd of April, 1833. Sirey, 1833, I, 435. Nevertheless, as they are not prohibited from entertaining jurisdiction in such matters by the code, they will do so where they think common justice or public policy require it and in every case where a foreigner has been admitted to domicile (Article 13) or where his rights have been guaranteed by treaties, in general commercial matters and in matters where provisional measures must be taken to preserve property or public health or morals. In effect, the exceptions to the general rule are so numerous that there remains nothing except questions of a purely personal nature arising between foreigners to which the old rule would seem applicable.

In matters concerning real estate, there can be no question of the jurisdiction of the tribunals, which is there not dependent upon the citizenship or alienage of the parties, but upon the *situs* of the property. (Article 3, Code Civil.)

In personal actions, the tribunals exercise a very large measure of discretion, for instance, divorces between foreigners are frequently granted where it appears that there is no other jurisdiction which can properly grant them. This is largely predicated

upon the growth of the doctrine of domicile *de facto,* the adoption of which tends to give to persons actually domiciled, although without permit, most civil rights. In divorce or separation cases, the party alleging lack of jurisdiction must prove that some other court would have jurisdiction over the question, otherwise the plea will be overruled.[12]

In effect, lack of jurisdiction in these cases is not a matter of public policy; it is *ratio personæ.* The courts have full power to give weight to all the circumstances of the case and to decide whether they will accept jurisdiction. The really determinative element is the actual domicile of the parties, and the case law in France has established the principle that a defendant having a domicile *de facto* in France interposing lack of jurisdiction as a defense cannot succeed unless he shows conclusively that some foreign court has jurisdiction to properly and effectively determine the matter.

In commercial cases, jurisdiction is a question of right, and is not facultative. The alien cannot raise the question, nor can the judge refuse to take jurisdiction. This seems to be based upon the doctrine admitted in the discussions leading to the drafting of the Code Civil that in commercial matters the Civil Code did not modify the existing law. The mercantile or commercial law administered by the special commercial tribunals is held to deal with a class of cases arising from business relations and outside of general civil law. Thus questions of alienage or of citizenship are necessarily excluded from such tribunals.

Public policy further requires that a great number of provisional remedies shall be accorded, such as those for the safety of minors and incompetents, or of properties situated in France belonging to foreign decedents, etc. The rules upon this subject not being found in the Code Civil must be sought for in the decisions of the courts and it is, therefore, difficult to systematize them. The general tendency is,

[12] Court of Appeals of Dijon, April 7, 1887; Paris Court of Appeal, Nov. 4, 1890; Journal de Droit International Privé of Clunet, 1890, p. 483; Tribunal Civil of the Seine, 1893; Journal de Droit International Privé of Clunet, 1893, p. 100; Lyons Court of Appeals, March 10, 1894; Sirey, 1895, 2, 298; Paris, Jan. 14, 1896, Journal de Droit International Privé, Clunet, 1896, p. 149.

however, in these matters to assimilate the alien to the citizen, and the cases in which they are excluded from the tribunals, simply by reason of the fact that the litigation involves the rights of aliens, alone are exceptional.

The English and American law in opening the national tribunals to native and alien alike are in full accord with the best public opinion of our time which conceives that the alien should have equal rights with the citizen or subject to appeal to the national courts. In many countries of Europe certain disabilities exist rather because of associating alienage with mere *non*residence, than because of existing prejudice against aliens. This seems as illogical as unnecessary and must in time disappear.

The CHAIRMAN. Is there any discussion?

Mr. KUHN. Mr. Chairman and Gentlemen: The previous speaker has given particular attention to the access which the alien has to the national courts by reason of his alienage. That access is not necessarily exclusive, because in the general run of cases the alien has access also to the State courts.

The principal topic which has interested me in the course of the discussion, and which has called to my mind certain cases that I have read at certain times in the past, is found in those cases which deny to the alien the right of access to the Federal courts in order to prove that he has a right to enter the country. As the speakers of the morning have shown us, Congress has not provided a judicial proceeding in order to determine the right of the alien to enter the country, but has placed it practically within the control of the executive department. We may differ from Congress on the point of the legislative expediency, but the Supreme Court of the United States has upheld the right of Congress to do that. Now comes the line of cases where the alleged alien demands admission, because he claims that he is not an alien, but a citizen of the United States, entitled to enter as of right, and then attempts to obtain a hearing in the Federal courts. Obviously involved in that hearing is the determination of his nationality. The Supreme Court of the United States, in a case where an alleged alien claimed to be a native-born

citizen of the United States, maintained the rule that, although the Constitution guarantees all citizens against being deprived of life, liberty and property without due process of law, and also permits all citizens to have recourse to the writ of *habeas corpus* in all periods except in time of war, these constitutional guaranties do not apply to one who has not yet been admitted to the soil, and as to him the court will adopt the fiction that he is not here.

Now fictions are at best very dangerous proceedings. If fictions were adopted in science, I fear that the building of the Panama Canal would not be an easy problem, and if this hotel were built upon a fiction, I fear that none of us would sit here with the equanimity that we all seem to have at the present moment. One writer has said that fictions were originally adopted by judicial bodies in order to mitigate the harshness of the law which ordinarily would find its application to a specific problem; but it does seem indeed to be a harsh application of a fiction, in order to render a law already sufficiently drastic, more drastic still. However, the Supreme Court has passed upon that, and the alleged alien claiming to be a citizen is denied access to the courts in order to prove that he is a citizen of the United States. We often speak of the "inalienable right" of the citizen, and it does appear to me that the right most inalienable of all is the right to prove citizenship before a judicial body. The Supreme Court has passed upon it, and I will not longer deal with the right or the wrong. Sufficient to say that Mr. Justice Brewer dissented from the opinion of the court in that case, and said it was abhorrent to him that a person should be denied the right to apply to a court for a judicial determination of his rights, as to whether he was or was not a citizen of the United States. I simply desire to urge this point: that Congress, whose power in this matter is supreme, should have its attention drawn to the fact that perhaps what was not intended by it has actually occurred, and access to the national courts denied upon the question of nationality itself.

We are taught that the Fourteenth and Fifteenth Amendments to the Constitution of the United States were adopted because it was feared that the denial of the right to a class of persons in the com-

munity who were under a general disability would have a tendency to create opportunities for the denial of rights to all citizens, to all persons within the community. I think I may close appropriately with that idea, that it is dangerous to deny to aliens the right of access to national courts, if as a result citizens of the United States in good faith shall be denied the right to prove in a judicial tribunal the fact that they are *bona fide* citizens.

The CHAIRMAN. The lateness of the hour suggests the postponement of the next subject to the meeting to-morrow morning. I am desired to announce to the Society that Messrs. Partridge, Lansing, Kuhn, Evans and Kingsbury have been appointed by the Executive Council a committee to report nominations for the following officers to be elected at the morning meeting: Honorary President, President, Vice-Presidents, and Executive Council to serve until 1914.

In the absence of objection I declare the meeting adjourned until to-morrow morning at ten o'clock, in this room.